

BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

DOCKET NO. FRA-2004-18746 - 16

UNION PACIFIC RAILROAD COMPANY –
PETITION FOR WAIVER

COMMENTS
OF
UNION PACIFIC RAILROAD COMPANY

Union Pacific Railroad Company ("UP") submits the following Comments in response to FRA's notice of September 7, 2004 in this proceeding.

UP is requesting a waiver from the requirements of 49 C.F.R. § 232.205 (Class I Brake Test – Initial Terminal Inspection), § 232.409 (Inspection and Testing of End of Train Devices), § 215.31 (Pre-departure Inspection) and § 229.21 (Daily Inspection). The waiver would apply only to run-through trains interchanged by Transportation Ferroviaria Mexicana ("TFM") to UP at the Laredo gateway, which TFM has inspected as prescribed by these CFR sections in Mexico (Sanchez Yard).¹ As explained in the waiver and in the October 1, 2004 public hearing, this is an important NAFTA initiative intended to reduce congestion at the border, and expedite international rail traffic.

The waiver petition and the testimony presented by UP and TFM at the October 1 public hearing thoroughly discuss how the requested waiver will work and the benefits that will result from it. Accordingly, these comments will respond to the arguments made by the labor unions opposing the waiver. We will focus primarily on the arguments made by the Brotherhood of Railway Carmen and the International

¹ At the October 1, 2004 public hearing, BRC/IBEW claimed that the waiver would permit a Class III transfer train test performed in Mexico to substitute for the Class I initial terminal test UP currently performs at Laredo. That is not what the waiver is proposing. The waiver would only apply to trains which receive an FRA compliant Class I brake test in Mexico.

Brotherhood of Electrical Workers ("BRC/IBEW") in their joint public hearing statement, which are representative of the positions taken by the other unions.

1. Ability Of TFM To Perform FRA Inspections.

The key issue presented by the waiver is whether TFM is capable of performing inspections in Mexico on the trains to be covered by the waiver which comply with parts 215, 229 and 232. The unions opposing the waiver claim that TFM's training is inadequate, and that inspections currently being conducted by UP carmen at the border "demonstrate a significant number of defects missed by TFM."

TFM will address training issues in its separate comments. The unions' claim that TFM is missing "a significant number of defects" on trains at interchange to UP is based on a listing of AAR defects presented by BRC/IBEW at the October 1 public hearing. This listing shows defects found by UP carmen on trains TFM interchanged to UP at Laredo during the period January – September, 2004.

Contrary to the way BRC/IBEW characterize their data, the data actually shows that TFM is fully capable of inspecting trains covered by the waiver to FRA standards. As discussed at the public hearing, TFM is currently performing the FRA Class I brake inspections and mechanical inspections described in the waiver only on UP Train ZMXYC. This is a northbound intermodal run-through train which has operated 20-30 times per month during 2004. The inspection data provided by BRC/IBEW covers mostly other trains which are not currently receiving this level of inspection. In fact, there are only six defects listed in the BRC/IBEW data which appear to involve train ZMXYC (two on 5-24-04, one on 7-10-04, one on 7-29-04, one on 8-16-04 and one on 8-30-04). The small number of defects BRC/IBEW have identified on the ZMXYC train shows that TFM is doing an excellent job of inspecting this train. UP also provided comprehensive data at the hearing showing AAR defects on northbound cars which TFM interchanged to UP at Laredo. The low defect ratios on trains to be covered by the waiver and the nature of the defects noted demonstrate the competency of the inspections performed in Mexico by TFM personnel.

2. FRA Oversight And Enforcement.

BRC/IBEW question whether FRA will be able to monitor inspections performed by TFM and take appropriate enforcement action, if necessary.

FRA will have ample opportunities to monitor TFM inspections. TFM has already agreed to permit FRA inspections in Mexico, where it will be performing the brake and mechanical inspections contemplated by the waiver. As discussed at the public hearing, FRA will also have the ability to inspect trains at Laredo or another location on UP, after UP has received the trains in interchange. In addition, UP will be implementing a Quality Assurance Plan involving reinspection of two TFM inspected

run-through trains per week.² The results of these inspections will be made available to FRA on request. UP will also conduct a monthly review of the Quality Assurance inspections with FRA personnel, and FRA inspectors will be invited to participate in these reviews.

With respect to enforcement, nothing in the waiver affects FRA's ability to enforce its rules against UP or another U.S. railroad. Further, in the unlikely event that TFM were to systematically fail to properly conduct the brake and mechanical inspections contemplated by the waiver, FRA has the authority to revoke the waiver and require UP to resume inspections at Laredo.³ The threat of revocation is a potent enforcement tool, since a revocation would effectively limit the amount of traffic UP and TFM can handle via the Laredo gateway.

3. Hazardous Materials.

As discussed at the public hearing, TFM would inspect trains subject to the waiver for compliance with U.S. hazardous materials rules. The unions question how this procedure complies with 49 C.F.R. § 174.9.

First, the suggestion that the TFM personnel performing these inspections are "poorly trained" or that the inspections are "less than rigorous" is completely unsupported. The fact is that Mexican hazardous materials regulations are more stringent than U.S. rules, as discussed by the TFM witness who testified at the public hearing. The comments being filed by TFM discuss the extensive hazardous materials training given to TFM employees. Significantly, none of the "defects" listed in the handout which BRC/IBEW distributed at the public hearing involve hazardous materials regulations.

Second, the unions appear to be suggesting that UP should have requested a waiver from 49 C.F.R. § 174.9. However, no waiver from this section is necessary. Prior to 1996, U.S. hazardous materials rules required a railroad to perform a haz mat inspection of each loaded, placarded tank car received in interchange, 49 C.F.R. 174.9 (1995). This requirement was removed in 1996, see 61 Fed. Reg. 28666 at 28677 (June 5, 1996). In proposing the current requirement, RSPA noted that it was removing the requirement to inspect placarded cars at every interchange because the requirement was impractical given current railroad operating practices. The example RSPA used to demonstrate this was the interchange of run-through trains without change of consist. RSPA then went on to explain that the new rule would require a hazardous materials inspection at "locations that now require an inspection under the FCSS" [Railroad Freight Car Safety Standards], 60 Fed. Reg. 65492 at 65494. Under

² BRC/IBEW claim that UP fails to describe "where or how these two weekly inspections will occur." However, the waiver petition specifically described the Quality Assurance reinspections and where they would occur (Waiver Petition, p. 3). UP's witnesses at the October 1 public hearing also described how trains would be selected for these inspections.

³ The waiver will not result in any irreversible facility or personnel changes at Laredo.

the waiver, the interchange of certain run-through trains at Laredo between TFM and UP will be accomplished without a FCSS inspection, the same way run-through trains are interchanged between U.S. roads. Since no FCSS inspection will be performed at the Laredo interchange, no § 174.9 inspection will be required at that location.

4. Security.

BRC/IBEW and BLET argue that UP should continue to inspect run through trains at the border because of “security” concerns. These arguments demonstrate the unions’ unfamiliarity with the stringent security measures in place at Laredo, which were described at the October 1 public hearing. Briefly, each railcar entering the U.S. is inspected at Laredo by U.S. Customs personnel, and run through a Vacis machine that uses gamma rays to inspect the car and its contents. In addition, each train receives a Customs inspection for unauthorized personnel at Gardendale, TX. None of the existing security measures will be affected by the waiver. If anything, the waiver will improve security. Today, after trains have received a Customs and security inspection at the border, they are pulled to the RG runaround track, broken up and left there for 5-7 hours, where they are readily accessible by unauthorized personnel. Under the waiver, the trains will move through Laredo and avoid this lengthy stoppage.

5. Other Issues.

The labor unions raise a number of other issues, which we will briefly address below:

- BRC/IBEW complain that the waiver petition is “silent as to how it [UP] intends to comply with regulation 232.109 which requires that the locomotive engineer be advised of the operational status of the dynamic brakes at initial terminal or at other locations where a locomotive engineer begins operation of the train.” Evidently, BRC/IBEW did not read the complete waiver petition. TFM will use a dual language document to provide dynamic brake status to UP engineers, and a copy of the form is included at Tab 15 to the petition.
- BLET argues that, instead of the waiver, UP should provide more facilities in the Laredo area and more fully utilize Port Laredo. But Port Laredo is near capacity due to the huge growth in cross border traffic. That is why most of the run-through trains UP receives from TFM are being inspected in Downtown Laredo rather than at Port Laredo. There is no room for expansion of the Downtown Laredo facility. The Port Laredo facility could theoretically be expanded if additional property could be acquired. However, acquisition of additional property would be difficult and expensive (the existing owners are holding the property for industrial expansion). In fact, the unusual design of the Port Laredo facility (the yard tracks are perpendicular to

the main track) was the result of problems UP experienced obtaining sufficient property with frontage on the main tracks to permit the yard to be laid out parallel to the main track. Further, even if the facilities could somehow be expanded, it makes no sense to do so simply to duplicate inspections that can be performed a few miles away in Mexico.

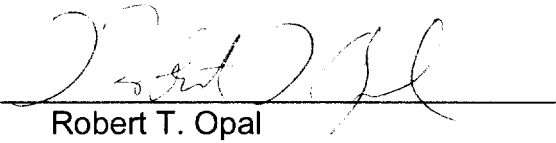
- UP originally proposed that FRA required records for TFM personnel and inspections would be kept by the Tex Mex Railway Company at its Serrano Yard, where the record would be available to FRA. After the Petition was filed, Tex Mex indicated it was not willing to keep these records. BRC/IBEW point to this as an example of the “difficulties posed were inspections to be performed outside the U.S. by carriers beyond the scope of FRA’s enforcement authority.” There are no “difficulties.” As discussed at the public hearing, UP will itself keep the records at its San Antonio office or will make alternate arrangements for FRA to have access to these records in the United States that are acceptable to FRA.
- Finally, BLET claims that, since UP locomotives operating into Mexico “generally” return to the U.S. within 24 hours, no waiver of § 229.21 daily inspection requirements is warranted. However, the problem is that they do not always return within 24 hours. If a TFM daily inspection were not valid for movement into the United States, at least some trains would have to be held at Laredo for daily inspections. Further, depending on the time of day a train is received, even locomotives returned within 24 hours might have to be stopped en route to San Antonio for a daily inspection of the locomotive consist. Since TFM is fully capable of performing FRA compliant daily inspections, there is no reason for any of these delays.

CONCLUSION

The record in this proceeding demonstrates beyond question that the requested waiver will result in enormous benefits to international trade and to the City of Laredo without compromising safety in any way. According, UP respectfully requests that FRA grant the waiver.

Respectfully submitted,

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